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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 591

JOSEPH IACULLO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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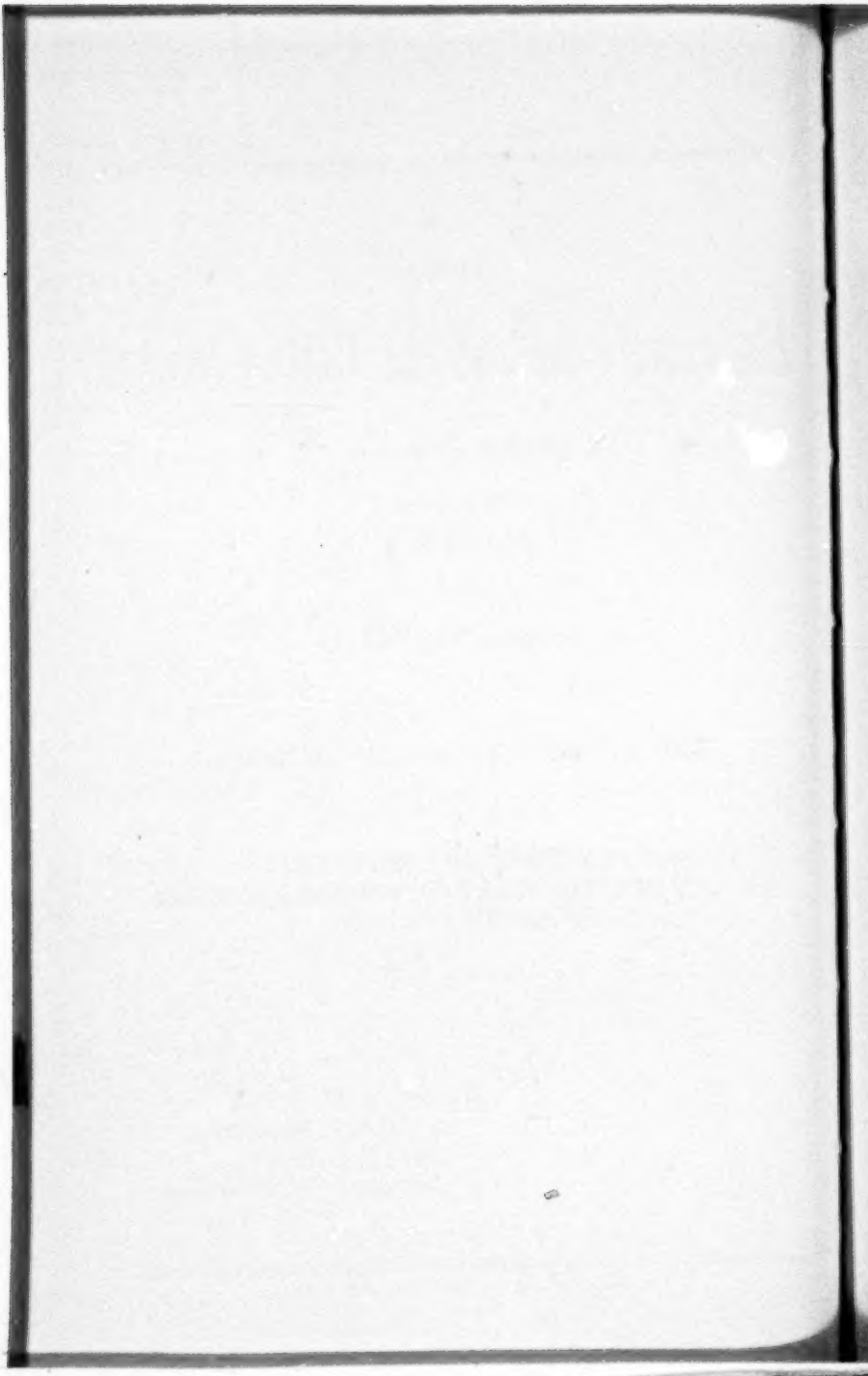

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THE UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Joseph Iacullo, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on June 21, 1955, and is not reported but is printed in the record filed with and certified by the clerk of the Court of Appeals below.

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The Opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed November 4, 1955, and is not yet reported but is set forth in the Appendix hereto, and in the certified copy of the Record.

JURISDICTION.

On November 25, 1955, it was ordered that the petition for rehearing be denied. (This order appears in the Appendix.) This petition is filed within 30 days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1) 62 Stat. 928.

QUESTIONS PRESENTED.

1. Where circumstantial evidence, although clearly showing association with wrongdoers, falls short of establishing a *prima facie* conspiracy, without the conversations of persons out of the presence of the defendant, and not within his agency or control, is it error to admit and consider such conversations between third persons to support conviction?

2. Is the duration of a conspiracy determined from the allegation of dates in an indictment, or from the evidence which shows the accomplishment and end of the objects alleged as the goal of the conspiracy?

3. Where the trial Court and the Court of Appeals clearly have considered innocuous incidents occurring after the termination of the conspiracy, under the proof, as establishing a *prima facie* conspiracy in order to admit and consider conversations of parties out of the presence of the defendant, which conversations are preju-

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dicial and persuasive of guilt, is a new trial required to determine the existence of the *prima facie* conspiracy, and admissibility of the conversations?

STATEMENT OF THE CASE.

The petitioner was convicted in a trial by Court, without a jury, on a 16 Count indictment. The petitioner was only named and brought to trial on 7 of the 16 counts in the indictment. Counts 7, 8, 9 and Counts 13, 14 and 15 contain substantive charges of violations of the narcotics statutes, and were in the usual form in such cases in that three counts were brought in connection with single transactions. That is, count 7 charged unlawful purchase of narcotics, count 8 charged unlawful sale of narcotics, and count 9 charged unlawful facilitation of the transportation and possession of narcotics. Each of these three counts refer to the single transaction on July 23, 1953. Count 13 charged unlawful purchase, Count 14 charged unlawful sale and Count 15 charged unlawful facilitation of transportation and possession on December 9, 1953.

Count 16 charged a conspiracy between the petitioner, Joseph Iacullo, Anthony Schullo, Anthony Sperna and Anthony Ponzi, all named as defendants, and Frank Coduto and Anthony Pape, named as conspirators, but not named as defendants, because they were deceased when this indictment was returned.

The petitioner was found guilty on all Counts and sentenced to five years on each Count, to run concurrently, and to pay a fine of $100.00 upon the indictment. Bail was denied pending review, and the petitioner has been serving the sentence since June 21, 1955, the date upon which sentence was imposed.

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In the Court of Appeals the petitioner complained that the evidence was not sufficient to support the conviction on any Count and contended that there was no proof of any more than mere association with the proved wrongdoers.

The Court of Appeals for the Seventh Circuit in its Opinion of November 4, 1955, reviewed the conviction upon the conspiracy Count alone, and stated at page 10 of its Opinion, which is appended hereto, that it deemed it unnecessary to consider any question as to the sufficiency of the evidence to support the conviction under the six Counts charging substantive offenses, inasmuch as the sentences on all Counts were ordered to run concurrently, and did not exceed the maximum under any single Count.

Thus, this Petition will be devoted only to the propriety of the Opinion and judgment of the Court of Appeals, with regard to the conviction on Count 16, the conspiracy count.

The conspiracy Count charged that a conspiracy existed from on or about July 16, 1953, up to on or about March 16, 1954, to commit offenses against the United States, to wit: unlawful purchase of narcotic drugs, unlawful sale to Harry V. Mattera of quantities of narcotic drug, and unlawful receipt, concealment, buying and facilitation of transportation and concealment of narcotic drugs; and the commission of the offenses set forth in the first fifteen Counts of the indictment.

The evidence consisted of two kinds of circumstantial evidence. The first kind consisted of evidence of physical circumstances, from which it was contended, an inference of implication in the conspiracy could be taken. The other kind of circumstantial evidence offered was evidence

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of conversations between Harry Mattera, a Federal Narcotic Agent, and Frank Coduto, a deceased alleged co-conspirator, all of which conversations were out of the presence of the petitioner. The petitioner took the stand in his own behalf and denied any implication in the conspiracy, and any knowledge of its existence, or of the existence of the narcotic transactions involved.

The conversations out of the presence of the petitioner were admitted upon the theory that a *prima facie* case of conspiracy had been established separately from these conversations.

The physical events and circumstances proved and relied upon to establish the *prima facie* case of conspiracy were:

1. The petitioner's presence in an automobile with Sperna, a co-defendant but not on trial, at the time when Sperna tossed a package to an empty automobile on July 23, 1953. The empty automobile was that of Agent Mattera and was parked in an open lot at a busy intersection in the City of Chicago in broad daylight. Sperna's delivery of the package was after a payment of money by Agent Mattera to another alleged conspirator, Frank Coduto, which payment was made out of the presence of the petitioner and without his knowledge. The package later was determined by Government Chemists to have contained narcotics, but was so wrapped that it would not indicate its contents in any manner (Tr. 55-62).

2. The presence of a fingerprint of the petitioner upon a newspaper, in the folds of which, a package of narcotics was delivered to Agent Mattera by Coduto out of the presence of Iacullo, the petitioner, on September 18, 1953, (this transaction was not charged in the indictment and was not referred to therein in any manner) (Tr. 146).

3. On October 14, 1953, the petitioner rode in an automobile with alleged conspirator Schullo some

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fifteen minutes after delivery by Schullo of a package of narcotics to Agent Mattera, which delivery occurred out of the presence of the petitioner, and with no showing of his knowledge thereof. Shortly after leaving the automobile of Schullo the petitioner met co-defendant Sperna on the street near Sperna's home (Tr. 315).

4. The presence of the petitioner's fingerprint upon a sheet of newspaper, admittedly several weeks old, which was wrapped around a package of narcotics delivered by Anthony Pape, a deceased alleged co-conspirator, on December 9, 1953, to Agent Mattera out of the presence of the petitioner, Iacullo. This was the last date upon which any narcotics was delivered or possessed by any of the alleged co-conspirators, under the proof admitted by the trial Court.

5. An incident upon February 18, 1954, more than 60 days after the last sale or proved possession of any character, of narcotics, when the petitioner was observed to leave an automobile driven by Sperna, and to enter a large building containing many apartments, and to emerge from this building about ten minutes later. About ten or fifteen minutes after the petitioner had entered and left the building alone, alleged co-conspirator Pape, involved in the December 9, 1953, transaction, emerged from the same building. Some evidence indicated that Pape's mother resided in this building, but there was no proof that the petitioner and Pape met or saw each other upon this occasion. There was no evidence of any narcotic transaction on this date (Tr. 95).

On the basis that this physical circumstantial evidence established a *prima facie* case of conspiracy against the petitioner, the trial Court admitted and considered several conversations between the deceased alleged conspirator Coduto and Agent Mattera, all of which conversations were out of the presence of the petitioner, and were not proved to be within his knowledge, or agency. Only two

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of these conversations referred to the petitioner, and then only by implication, and inference (Tr. 341, 346).

As a part of the first sale of narcotics by Coduto to Agent Mattera, Mattera was told by Coduto "I'll have to give the fellows a call." After Mattera had waited a considerable time for delivery, Coduto indicated Mattera's automobile and Sperna's car and said "There they are now." This conversation occurred several hundred feet away from the automobile of Sperna who tossed the package of narcotics to Mattera's car, and was not in the presence or hearing of the petitioner who was a passenger in the car that Sperna was driving. This was on July 23, 1953, the date of the first transaction charged and mentioned in the proof (Tr. 331-343).

Probably the most dangerous and prejudicial of the conversations, was stated in testimony by Agent Mattera as having occurred on August 13, 1953, between Mattera and Coduto, deceased, at which time Coduto was alleged to have said he could not fulfill an order for narcotics by Mattera because "the fellows were out of town." (Tr. 345). On inquiry as to what fellows were meant, Coduto is alleged to have said, "The fellows that were in the car the other day, the other time." (Tr. 346).

The petitioner testified in his own behalf and stated that he frequented a neighborhood candy store and restaurant at which newspapers and magazines were handled, and which store was more or less of a gathering place or meeting place for the people in the neighborhood of Taylor and Ashland Avenues in Chicago, Illinois, and which neighborhood is an old and deteriorated community, heavily populated, and within two and one-half miles of Chicago's Loop area. The petitioner stated that he frequently inspected the newspapers on the stand in this store and at the adjoining news stand and frequently

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discarded the papers which he purchased or replaced them upon the stand and returned newspapers which he had inspected for some special news item or sport result. The petitioner denied any knowledge of the existence of the narcotics involved in the transactions and any knowledge of any conspiracy. He admitted that he knew and frequently saw Schullo and Sperna about the neighborhood and in the store mentioned but denied any association with Pape or Coduto and any knowledge of their activities, although he did know who they were (Tr. 438-470).

The Court of Appeals entered an order dispensing with printing of the record, and the appeal was considered upon the typewritten stenographic transcript, and the record of pleadings and orders was composed by the Clerk.

There is appended hereto a copy of the Opinion of the Court of Appeals, and a statement of its judgments.

REASONS FOR GRANTING THE WRIT.

I.

This case merits a review because the Opinion of the Court of Appeals establishes a precedent for conviction in conspiracy cases which is not consistent with the decisions of this Court, and with decisions of the Court of Appeals below, and other Courts of Appeals for other Circuits.

This conviction and the Opinion and judgment of the Court of Appeals will create a dangerous extension of the established law concerning conspiracy prosecutions and may authorize and lead to conviction for conspiracy upon mere proof of association, between alleged conspirators, under suspicious circumstances. The decision of the Court below constitutes a relaxation of the law which requires *prima facie* proof of the existence of the con-

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spiracy alleged, and participation in, and knowledge thereof, by a defendant before conversations out of his presence, control and authority can be admitted. Thus, the case is important and should be reviewed by this Court as important to the administration of criminal justice.

It is respectfully contended that the trial Court, and the Court of Appeals, in determining the existence of a *prima facie* case, before admissions of conversations out of the presence of the defendant, relied upon an innocuous event which occurred 60 days after the conspiracy had ended. This event is the occurrence on February 18, 1954, where the petitioner was observed to enter and leave a large apartment building, some fifteen minutes before another alleged conspirator departed from that building. There was no showing that the petitioner met Pape, the other alleged conspirator on that date, or even knew of his presence in the neighborhood.

This event of February 18, 1954, which was admitted and considered by the trial Court as helping to support the existence of the *prima facie* conspiracy, occurred more than 60 days after the last object of the alleged conspiracy had been achieved and completed, under the proof produced and admitted at the trial (Tr. 95).

It is apparent that the trial Court and the Court of Appeals have erroneously considered this event of February 18, 1954, under the misapprehension that because it was within the period alleged in the indictment, it was admissible to prove the indictment.

According to the indictment, the conspiracy existed from July 16, 1953, until March 16, 1954. However, the proof, under the evidence, showed that all objects of the conspiracy, as alleged in the indictment, were completed

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on December 9, 1953, and there was no evidence that any step was taken by any conspirator in furtherance of any object of the conspiracy thereafter.

The Court of Appeals said in a footnote to its Opinion at page 9 thereof:

> "4. Defendant contends that this evidence was inadmissible because this occurred 'some 60 days after the completion and attainment, so far as any proof is concerned, of any object of the conspiracy, as laid in the indictment.' This objection is not well taken because the conspiracy charged in the 16th count was a joint venture continuing until March 16, 1954, when the conspirators were arrested. The February 18, 1954 occurrence was incidental to the carrying out of the conspiracy itself and proof thereof was admissible."

It is respectfully urged that this is contrary to the decision of the Court of Appeals below in *United States* v. *Moloney*, 200 F. 2d 344, 347, and to the decision of this Court in *Fiswick* v. *United States*, 329 U. S. 211.

In *United States* v. *Moloney*, 200 F. 2d 344 at page 347, the Court of Appeals below said:

> "In the *Fiswick* case, the Supreme Court said, 329 U.S. at page 217, 67 S. Ct. at page 227: 'While the act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking, *Pinkerton* v. *United States*, 328 U.S. 640, 646-647, 66 S. Ct. 1180, 90 L. Ed. 1489, and cases cited, all such responsibility is at an end when the conspiracy ends. *Logan* v. *United States*, 144 U.S. 263, 309, 12 S. Ct. 617, 632, 36 L. Ed. 429; *Brown* v. *United States*, 150 U.S. 93, 98, 14 S. Ct. 37, 39, 37 L. Ed. 1910.' See also: *Krulewitch* v. *United States*, 336 U.S. 440, 443-444, 69 S. Ct. 716, 93 L. Ed. 790. While any declarations made by appellant after the termination of the conspiracy might be used as an admission against interest, in the case at bar, as pointed out

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previously, appellant at all times vigorously asserted that he knew nothing of the extortion letters until after his arrest. There is nothing in any statement made by appellant, or in his testimony at the trial, that is proof of the existence of the conspiracy charged."

II.

A matter of major concern, in the view of the petitioner, is that the evidence admitted to prove the knowledge of the petitioner, and his connection with the conspiracy was not of such character as to sustain a finding of proof of guilt beyond a reasonable doubt. It is admitted that the proof establishes suspicious circumstances and establishes association between the petitioner and two of the alleged conspirators, Schullo and Sperna. It is contended, however, that mere proof of suspicious circumstances and of association with wrongdoers, does not establish a *prima facie* conspiracy case, and is far short of proof which will sustain a finding of guilt beyond a reasonable doubt. *United States* v. *Di Re,* 332 U.S. 581, 593; *United States* v. *Wainer* (C. A. 7) 170 F. 2d 603, 606.

It is true that the evidence which established the items of physical circumstances, heretofore mentioned, show that the petitioner knew and associated with two of the proved wrongdoers, Sperna and Schullo. The evidence also established that the petitioner had touched or handled newspapers, subsequently used by some of the conspirators to conceal narcotics. The evidence showed that all of the conspirators frequented the same neighborhood, and that some of them frequented a candy and newspaper store where the petitioner was a frequent visitor. While the presence of fingerprints of the petitioner on the newspapers was real and substantial evidence that he had

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touched or handled the newspapers, there was no proof that these newspapers had any relationship to narcotics at the time and place that the petitioner touched the newspapers, and no inference of possession of narcotics by the petitioner is justifiable from this evidence.

The petitioner's presence in an automobile from which a conspirator threw a package subsequently found to contain narcotics cannot justify an inference that he knew this conspirator's purpose, or knew that the innocent appearing package which bore no identification, contained narcotics.

In *United States* v. *Di Re*, 332 U. S. 581, 593, this Court said:

> "An inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case. The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is far-fetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passersby, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration coupons it would not follow that he would know them to be counterfeit. Indeed it appeared at the trial to require an expert to establish that fact. Presumptions of guilt are not lightly to be indulged from mere meetings."

It is further respectfully urged that even the conversations relied upon by the Government in this case were only weakly inferential in their reference to the petitioner. Of course, these oral statements by a conspirator,

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deceased at the time of trial, made out of the presence of the petitioner cannot be relied upon to establish his connection with or knowledge of the conspiracy.

It is respectfully submitted that this conviction falls within the criticism of the concurring Opinion of Justice Jackson in *Krulewitch* v. *United States,* 336 U. S. 440, at pages 445-448, which concurring Opinion was joined in by Justice Frankfurter and Justice Murphy. The constant tendency of prosecutors to extend the theory of conspiracy and to secure admission and conviction by an avalanche and hodge-podge of acts and statements of others which the defendant may never have authorized, intended or even known of, to support convictions should be curbed, and to this end, certiorari is here sought.

CONCLUSION.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MAURICE J. WALSH
Attorney for Petitioner.

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APPENDIX.

OPINION.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11496. OCTOBER TERM, 1955, OCTOBER SESSION, 1955.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JOSEPH IACULLO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 4, 1955.

Before DUFFY, *Chief Judge,* FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Defendant Joseph Iacullo has appealed to this court from a judgment based upon a finding of guilty in a case tried without a jury. He was sentenced to 5 years on each count in which he was named in an indictment, to run concurrently, and fined $100.

The indictment also named Anthony Schullo, Anthony Sperna and Anthony Ponzi, as defendants. Iacullo, with Sperna, is charged in counts 7, 8 and 9, with illegal purchase, sale, and receiving, concealing, buying and facili-

tating the transportation of narcotics, on July 23, 1953, and in counts 13, 14 and 15, only Iacullo is charged with similar unlawful acts on December 9, 1953. In count 16, Iacullo, Schullo, Sperna and Ponzi are charged with conspiring with Frank Coduto and Anthony Pape, then deceased, and with unknown persons, to commit offenses against the United States, to wit: unlawful purchase of narcotic drugs, unlawful sale to Harry V. Mattera of quantities of a narcotic drug, and unlawful receipt, concealment, buying and facilitation of transportation and concealment of narcotic drugs, and the commission of the offenses set forth in the first fifteen counts of the indictment, including the six counts naming Iacullo, the conspiracy being alleged to have commenced on or about July 16, 1953, and to have continued to on or about March 16, 1954.

Ponzi was granted a severance, Schullo pleaded guilty as to three counts and was dismissed as to the others in which he is named, and Sperna pleaded guilty to count 9 and was dismissed as to the other counts naming him.

Before us, Iacullo contends that the total evidence does not sustain his conviction, that the district court erred in admitting and considering certain evidence and that mere association is not a basis for conviction.

There is evidence, some of it contradicted and some of it uncontradicted, tending to prove facts which we now set forth chronologically.

Harry V. Mattera, an agent of the Federal Bureau of Narcotics, on July 23, 1953, parked a Cadillac automobile in a parking lot at the southeast corner of Van Buren and Paulina Streets, in Chicago. At about 6:30 p.m. Mattera met Coduto at said street intersection and told him that he desired to purchase two ounces of heroin and that he

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had $800 which Coduto said was necessary to pay for it. Coduto told Mattera to accompany him to the corner drug store, known as the College Pharmacy, where Coduto said, "I'll have to give the fellows a call." Mattera gave Coduto $800, whereupon Coduto went to the rear of the store and made a telephone call. Coduto thereupon left the store with Mattera. Coduto told Mattera that the delivery would be made about 8:30 p.m. Mattera waited in a tavern until that time and then rejoined Coduto on the street. Coduto said the delivery would be made shortly. A few minutes later he pointed to Mattera's automobile and said, "There they are now." A 1949 Plymouth car was entering the parking lot. It pulled up parallel to the Cadillac. Sperna, the driver, threw a package into or through the Cadillac. Iacullo was seated next to the driver. The Plymouth was driven out of the lot and around the immediate vicinity, and south to Congress Parkway, thence into a deadend street, where Sperna turned the car around and drove again to Van Buren and Paulina Streets and then north. Mattera walked into the parking lot, looked inside the Cadillac, then got out of the car and bent over and picked up a small package which was wrapped in newspaper and had two manila containers inside it containing heroin hydrochloride, a derivative of opium. Neither the containers nor the newspaper contained federal tax stamps and Mattera did not give an order form for the purchase of narcotics.

On August 13, 1953, Mattera told Coduto that he desired to purchase two more ounces of heroin, but Coduto said that the order could not be filed "because the fellows were out of town." Mattera asked what fellows he meant and Coduto said, "The fellows that were in the car the other day, the other time."

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On September 18, 1953, about 7:30 p.m., Mattera had another conversation with Coduto in the same drug store[1] and there gave Coduto $800. Mattera went to a restaurant at Ogden Avenue and Madison Street where he saw Anthony Schullo about 11:15 p.m. Schullo made a phone call and left the restaurant. About 11:30 p.m. Coduto entered the restaurant and gave Mattera a Chicago newspaper dated September 19, 1953 in the folds of which Mattera found an envelope containing heroin, but bearing no tax stamps. William J. Sheehan, a special investigator for the government, found one fingerprint on the newspaper that agreed with an impression of the right index finger of Iacullo taken by Sheehan when Iacullo was brought to the Narcotics Bureau under arrest on March 16, 1954.

On October 13, 1953, Mattera was seated in a booth in the College Pharmacy with Coduto and Schullo. Mattera told Coduto that he was dissatisfied with his methods of transacting business and that he refused to do any further business with him. Schullo said to Mattera, "Well, don't bother, from here on in, I will take care of you,—I will take care of your needs." Mattera told Schullo that he wished to purchase some narcotics and Schullo made a telephone call from the rear of the store, whereupon he returned and told Mattera that "his connection" would be there about 9 o'clock. The first time that Mattera had seen Anthony Pape was about 8:45 p.m. when Pape was going through the revolving door into the street. Schullo then left Mattera's presence for about 5 or 10 minutes.

On October 14, 1953, about 9 a.m., Mattera met Schullo and Coduto in the College Pharmacy and Mattera then gave Schullo $800. Mattera and Coduto entered Mat-

[1] This transaction is not covered specifically by the indictment.

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tera's automobile. Narcotics Bureau agent Durham, in his car, followed by Schullo in a 1949 Plymouth sedan, took a position behind Mattera's car and the three automobiles proceeded to the Ogden Avenue and Jackson Boulevard service station into which Mattera and Coduto turned. Schullo continued west on Jackson Boulevard for a short distance and Durham continued driving west, ahead of Schullo. In his rear view mirror, Durham saw Schullo make a U-turn and drive back east to the service station. Durham made a U-turn. Schullo drove into the station beside Mattera's car. Schullo left his car and joined Mattera and Coduto after which Mattera entered the men's room, where he obtained a package containing narcotics, which was secreted under a wash basin in the station. He then left the station alone in his car. Coduto and Schullo entered Schullo's car and drove to Van Buren and Paulina Streets where the car was parked. Coduto left the car and Schullo was then joined by Iacullo. They sat in Schullo's car for 2 or 3 minutes after which Schullo drove the car south on Paulina Street and turned east into Taylor Street where the car was again parked. Schullo and Iacullo talked in the car for 10 or 15 minutes after which Sperna walked along the street from his nearby home. Iacullo then left the car and approached Sperna and a conversation took place. Iacullo waved his hand to Schullo after which the latter drove his car away. Iacullo remained with Sperna. They went to a luncheonette at Ashland Avenue and Taylor Street. They had on numerous occasions visited this luncheonette where they conversed with each other and Iacullo talked to many other persons there.

The first time Mattera spoke with Pape was on November 28, 1953 in a tavern. On December 9, 1953, they talked on the telephone and at 8 p.m. that day they met near

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Ferdinand and Hamlin Streets, where Mattera received a package containing narcotics from Pape and gave him $1,650. The outer wrapping of the package was a half sheet of a newspaper wrapped around two envelopes, and encircled by a rubber band. This half sheet of newspaper contained two fingerprints of Iacullo identical with his prints later taken on March 16, 1954.

None of the packages which Mattera obtained in any of the transactions referred to herein bore federal tax stamps.

On February 18, 1954, about 9 a.m., an automobile driven by Sperna stopped near the premises at 1620 Roosevelt Road and Iacullo got out of the car, entered said premises, reappeared in five or ten minutes, entered Sperna's car and left. Ten or fifteen minutes thereafter

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Pape came out of said building, entered a car and left the vicinity. Mrs. Pape, the mother of Anthony Pape, lived in the second floor apartment, the mail box for which bore the name of James Pape. The telephone there was registered in the same name. The building had other entrances under different street numbers.

There is a dispute in the evidence as to what occurred at the Bureau of Narcotics when Iacullo's fingerprints were taken by Sheehan on March 16, 1954, following his arrest. Iacullo testified that he asked why he was under arrest and stated that he did not want his "prints" taken. He was told that "it is customary when you are under arrest." He said that the United States marshal read the charge to him the next morning. Government witnesses testified that a warrant had been issued for the arrest of Iacullo but that it was not in the possession of the agents when the arrest was made. There was no physical force used to procure Iacullo's fingerprints. Sheehan testified that Iacullo made no objection when asked to come to the stand for fingerprinting. Agent Cass testified that when brought in to have his fingerprints taken Iacullo did not object and was not handcuffed.

1.(a) Defendant contends that the taking of Iacullo's fingerprints on March 16 violated the constitutional provisions against unlawful search and seizure and self incrimination.

He relies upon the dissenting opinion in *United States v. Pisano,* 193 F. 2d 361, at 365. However, the majority opinion holds, at 363, that, under the fourth amendment of the constitution of the United States, "If the arrest is valid then a search of the immediate premises where the defendant is arrested is reasonable."

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In the case at bar, Iacullo had been validly arrested under a pending warrant and he was in custody when his fingerprints were taken. There was sufficient evidence to indicate that he did not in any way object when requested to permit his fingerprints to be taken.

Defendant relies principally upon *United States* v. *Di-Re*, 332 U. S. 581. However, in that case the decisive evidence upon which defendant was convicted of knowingly possessing counterfeit gasoline ration coupons in violation of § 301 of the Second War Powers act, 1942[2], was that obtained by search of his person, after he was arrested without a warrant of any kind. The court, speaking of the defendant, said at 587:

> "If he was lawfully arrested, it is not questioned that the ensuing search was permissible."

In the case at bar, Iacullo was lawfully arrested before his fingerprints were taken. A warrant had theretofore been issued for his arrest and the morning following his arrest the marshal read the warrant to him.

In *Holt* v. *United States*, 218 U. S. 245, 54 L. Ed. 1021, one in custody on a charge of murder objected that evidence that he put on a blouse and that it fitted him, was inadmissible because he had put the blouse on under duress. However, at page 252, the court in rejecting the contention, said:

> "But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."

[2] 50 U. S. C. App. (Supp. V, 1946), § 633.

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We hold that under the circumstances proved, Iacullo's constitutional rights were not violated when his fingerprints were taken and at the trial used as a basis for comparison with fingerprints found on newspapers used to wrap narcotics.

(b) Defendant objected at the trial to the introduction of evidence concerning the transaction on September 18, 1953, because he contends that "the indictment gives no notice of any such offense or occurrence by any allegation of act or deed, other than the general charge of conspiracy." He claimed surprise upon the offer of this proof. However, the court admitted it. He argues that the only evidence connecting him with that transaction was the presence of his fingerprint upon the newspaper used concealing the narcotics which Coduto sold to Mattera. His counsel admits that the government gave notice by delivering a photograph of a fingerprint to defendant's counsel prior to the trial, which bore the inscription "on September 18, 1953, Pinna and Coduto," and also "middle finger—RT. Hand." There was no surprise.

A complete offense was proved to have been committed on September 18, 1953. Iacullo was not charged with or found guilty of that offense. However, the similarity of the manner in which that offense was committed, being in remarkable conformity to the pattern of other transactions which were involved in the conspiracy charged against him, made this evidence admissible.

As a general rule, upon the trial of an accused person, evidence of another offense, wholly independent of the one charged, is inadmissible. As was said in *Bracey* v. *United States*, 142 F. 2d 85, at 87, this rule is subject to some well established exceptions. For instance, such evidence is admissible if it is so related to or connected with the crime

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charged as to establish a common scheme or purpose so associated that proof of one tends to prove the other, or if both are connected with a single purpose and in pursuance of a single object; as well as to establish identity, guilty knowledge, intent and motive.

As to the conspiracy count, proof of the September 18, 1953 offense was admissible as corroborative of other evidence received to prove that count, because the pattern of that transaction bore a strong resemblance to the pattern of other transactions proved to have taken place in carrying out the conspiracy. The evidence as to September 18, 1953, was cumulative, as well as corroborative. In addition to that, the presence of Iacullo's fingerprint in the September 18, 1953 transaction was also admissible as tending to show his participation in the acts stated in count 16 to be objects of the conspiracy. For instance, the December 9, 1953 transaction also involved Iacullo's fingerprints[3]. He disclaims any criminal connection with that event. The evidence of September 18, 1953 tends to rebut that contention.

(c) Defendant also contends that the district court erred in admitting evidence of conversations out of the presence of Iacullo, referring particularly to the conversation related by Mattera as having occurred on August 13, 1953, between him and Coduto (who, like Pape, was overtaken by death before the trial), at which time Coduto said he could not fill Mattera's order for narcotics "because the fellows were out of town" meaning "The fellows that were in the car the other day, the other time."

When this evidence was received, the government had already proved a *prima facie* case of conspiracy as charged in count 16. For that reason this evidence was admitted

[3] Iacullo has never disputed that any of the fingerprints in evidence are his.

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by the district court. We believe that the court was not in error in so doing. See *Braatelien* v. *United States,* 147 F. 2d 888, where the court said, at 893:

> "Upon the trial several farmers testified that when Bergen solicited them to file petitions under the Act with Braattelien he, Bergen, made statements which, if true, implicated Braatelien in the conspiracy. All such declarations were objected to as hearsay because made in the absence of Braatelien. * * * It is the law also, that when a conspiracy is established *prima facie* everything said or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said or done by every one of them, and is admissible against each of them. 11 Am. Jur., Conspiracy, § 40. The declarations of each of the parties is a part of the *res gestae. Wiborg* v. *United States,* 163 U. S. 632, 657, 16 S. Ct. 1127, 1197, 41 L. Ed. 289. Each conspirator is in law a partner and agent of every other member of the conspiracy. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 249, 38 S. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461."

2. The burden was upon the government to prove the conspiracy charged in count 16 by either direct proof or circumstantial evidence, or both.

As direct proof, it introduced the sworn testimony of witnesses indicating that illegal sales of narcotics were made by the alleged conspirators Coduto, Sperna, Schullo and Pape, each always acting in concert with some of the others named. In addition, direct evidence also showed Iacullo's repeated appearances with various of the alleged co-conspirators under circumstances from which it could be reasonably inferred that he was actively engaged in the furtherance of the conspiracy. For instance, it was proved that on July 23, 1953, as a Plymouth car was driven alongside a government agent's Cadillac in the parking lot,

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Coduto, who had that evening arranged for the sale of narcotics to the agent, pointed toward the Cadillac and said, "There they are now," and that Iacullo was present in the car with Sperna when the latter made the delivery in a highly suspicion-invoking manner and while Sperna drove around in the vicinity of the place of delivery with the obvious purpose of observing that the package was picked up. On October 14, 1953, when Schullo, with Coduto in his car, parked it, Coduto left and Iacullo entered the car. Schullo then drove to a point near Sperna's home and Schullo and Iacullo talked in the car until Sperna appeared. Iacullo left the car and joined Sperna for a conversation, waving to Schullo who thereupon drove away. Iacullo and Sperna then went to a luncheonette. On February 18, 1954, Sperna drove Iacullo to the building where Pape's mother lived,[4] and Iacullo entered the building. Ten or fifteen minutes after he returned to Sperna's car and was driven away, Pape came out of the building.

Circumstantial evidence tending to indicate that Iacullo handled the newspaper wrappings of the deliveries made pursuant to two of said sales was introduced in the form of testimony that his fingerprints appeared thereon.

After the government had laid a foundation by establishing a *prima facie* case of conspiracy, the district court received direct testimony that on August 13, 1953, Coduto explained that he could not then fill an order for heroin because "the fellows that were in the car the other day, the other time" were out of town.

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[4] Defendant contends that this evidence was inadmissible because this occurred "some 60 days after the completion and attainment, so far as any proof is concerned, of any object of the conspiracy, as laid in the indictment." This objection is not well taken because the conspiracy charged in the 16th count was a joint venture continuing until March 16, 1954, when the conspirators were arrested. The February 18, 1954 occurrence was incidental to the carrying out of the conspiracy itself and proof thereof was admissible.

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It is the contention of defense counsel that, despite the foregoing evidence, Iacullo was innocent of any participation in the sales of narcotics. Indeed that is the tenor of Iacullo's testimony at the trial. It became a question of fact for the district court to determine whether the direct evidence and the reasonable inferences to be drawn from the circumstantial evidence were to be accepted as guilt of Iacullo or his testimony to the contrary was to be accepted. The court, who observed Iacullo and the other witnesses testify, was in a better position than we to determine this question. We cannot say that the court was in error in coming to the conclusion that the evidence proved him guilty beyond a reasonable doubt. Iacullo's repeated personal appearances with those then engaged in executing the conspiracy, together with fingerprint evidence that he personally handled the wrappings of narcotics illegally peddled by the conspirators, he now attempts to explain on the theory of innocent coincidence. We reject that explanation, as did the district court.

In reviewing the record we may not weigh the testimony or determine the guilt or innocence of Iacullo. We must take that view of the evidence most favorable to the government to sustain the finding of the district court, there being substantial evidence to support it. In *Braatelien* v. *United States*, 147 F. 2d 888, at 893, the court said:

> "The existence of the conspiracy and the participation of the defendants need not be established by direct proof. Circumstantial evidence is sufficient when the facts and circumstances are such as legitimately tend to sustain an inference of their existence. '• • • generally, direct proof of a criminal conspiracy is not available and it will be disclosed only by a development and collocation of circumstances.' *United States* v. *Manton, supra*, 107 F. 2d 834 at page 839."

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The existence of the conspiracy and the participation of Iacullo therein are established by proof, both direct and circumstantial. The evidence supports the finding of guilty in count 16 and the judgment thereon.

3. We find it unnecessary to consider any question as to the sufficiency of the evidence to support the conviction of Iacullo under the six counts charging him with substantive offenses, inasmuch as the sentences imposed upon him on each of said counts and on the conspiracy count were the same and were ordered to run concurrently. In *Abrams* v. *United States*, 250 U. S. 616, 63 L. Ed. 1173, at 1176, the court said:

> "We shall not need to consider the sufficiency, under the rule just stated, of the evidence introduced as to all of the counts of the indictment, for, since the sentence imposed did not exceed that which might lawfully have been imposed under any single count, the judgment upon the verdict of the jury must be affirmed if the evidence is sufficient to sustain any one of the counts. *Evans* v. *United States*, 153 U. S. 608, 38 L. ed. 839, 14 Sup. Ct. Rep. 939; *Claasen* v. *United States*, 142 U. S. 140, 35 L. ed. 966, 12 Supp. Ct. Rep. 169; *Debs* v. *United States*, 249 U. S. 211, 216, *ante*, 566, 569, 39 Sup. Ct. Rep. 252."

To the same effect are *Sinclair* v. *United States*, 279 U. S. 263, at 299, and *Brooks* v. *United States*, 267 U. S. 432 at 441.

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For the reasons herein stated, the judgment from which Iacullo has appealed, is

AFFIRMED.

Judge FINNEGAN concurs in the result.

A True Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

Judgment and Orders of Court of Appeals.

Judgment entered November 7, 1955, affirming judgment of District Court.

Order entered November 25, 1955, denying Petition for Rehearing.

Certificate of Clerk of Court of Appeals for Seventh Circuit, dated December 2, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 591

JOSEPH IACULLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a-15a; R. 54-64) is reported at 226 F. 2d 788.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1955 (Pet. 15a; R. 65), and a petition for rehearing was denied on November 25, 1955 (Pet. 15a; R. 66). The petition for a writ of certiorari was filed on December 27, 1955. The jurisdiction of this Court in invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient independent evidence of petitioner's participation in the conspiracy charged in the indictment to justify the admission in evidence against him of declarations by co-conspirators.

2. Whether the court properly admitted testimony as to events which occurred after the last overt act charged in the indictment, where these events preceded the arrest of any of the defendants and there was no evidence tending to show an earlier termination of the conspiracy.

STATEMENT

Seven counts of a sixteen-count indictment returned on February 28, 1955, in the United States District Court for the Northern District of Illinois charged petitioner and others [1] with a conspiracy from about July 16, 1953, to March 16, 1954, to violate federal narcotics laws (count 16) and with substantive narcotics violations on July 23, October 14, and December 9, 1953 (R. 6-23).[2] Petitioner, who waived his right to a trial by jury (Tr. 45), was con-

[1] The indictment named Anthony Schullo, Anthony Sperna and Anthony Ponzi as defendants and Frank Coduto and Anthony Pape, who were killed subsequent to the events in question (Tr. 502, 503), as co-conspirators (R. 6-23). None of the co-defendants were tried with petitioner. Sperna and Schullo pleaded guilty to the substantive counts, and the court dismissed the conspiracy counts as to them. Ponzi's trial was severed.

[2] The designation "R." refers to the record on appeal, and the designation "Tr." to the typewritten transcript of the trial proceedings.

victed on all seven counts and sentenced to concurrent terms of imprisonment of five years on each count and to a fine of $100. (R. 33). Upon appeal, the judgment of conviction was affirmed (R. 65).

The evidence adduced by the government may be summarized as follows:

About 6:30 p. m. on July 23, 1953, Frank Coduto told federal narcotics agent Harry Mattera, in response to the latter's request to purchase heroin, to accompany him to a nearby drugstore where, Coduto said, he would have "to give the fellows a call." After agent Mattera gave Coduto the purchase price of $800 and the call was made, Coduto said that delivery would be made about 8:30 p. m. (Tr. 53, 54, 55, 56-57, 341-342) At that time Coduto rejoined agent Mattera and told him that the delivery would be made shortly (Tr. 343). Within a few minutes a car driven by Sperna, accompanied by petitioner, drove up to agent Mattera's car, which was parked nearby. Coduto said "There they are now." Sperna threw a package toward Mattera's car and drove away, but maintained observation of the area for a few minutes. (Tr. 55, 56, 57, 104-107, 159-163, 343-344.) Mattera picked up the package, which was wrapped in newspaper. It contained two envelopes which upon analysis were found to contain heroin. (Tr. 63, 323-324, 373, 374)

On August 13, 1953, Coduto refused Mattera's request to purchase more heroin "because the fellows were out of town." When Mattera asked what fellows he meant, Coduto replied "The fellows that

were in the car the other day, the other time" (Tr. 344-345).

On September 18, 1953, about 7:30 p. m., Mattera gave Coduto $800 for heroin. Later that evening Mattera went to a restaurant where he saw Anthony Schullo, who made a call and left. Within about fifteen minutes, Coduto entered and gave Mattera a package wrapped in newspaper. It contained an envelope which upon analysis was found to contain heroin (Tr. 141-142, 145-147, 189-191, 325). On the newspaper was one of petitioner's fingerprints (Tr. 243).

On October 13, 1953, Mattera, who was seated with Coduto and Schullo in a drugstore, told Coduto that he was dissatisfied with his business methods. Schullo said that he would thereafter take care of Mattera's needs. Mattera then asked for narcotics. Schullo made a phone call from the drugstore and informed Mattera that "his connection" would arrive about 9:00 p. m. (Tr. 345-347) About 8:45 p. m. Mattera saw Anthony Pape leave the drugstore (Tr. 347). Schullo left immediately thereafter and returned within about five or ten minutes (Tr. 348).

About 9:00 a. m. the following morning, Mattera met Coduto and Schullo at the same drugstore and gave Schullo $800. Coduto went with Mattera in his car to a service station, and Schullo followed them in his car. At the service station, the three left their cars and Mattera went into the washroom where he found a package which upon analysis was found to contain heroin. (Tr. 66-68, 312-315, 324.) Mattera departed alone in his car. Schullo drove

off with Coduto, dropped Coduto off, and was joined by petitioner. After talking for a few minutes, Schullo and petitioner drove off, parked near Sperna's house, and talked for about 10 to 15 minutes. When Sperna came out, petitioner left the car, talked to him, and then waved to Schullo, who drove away. Petitioner and Sperna went to a nearby luncheonette which they frequented. (Tr. 315-317.)

Mattera talked to Anthony Pape for the first time on November 28, 1953. On December 9, 1953, after a telephone conversation with Pape, Mattera met him and received from him a package wrapped in a newspaper for which Mattera paid $1650. (Tr. 75-78.) Upon analysis the package was found to contain heroin (Tr. 324-325). Fingerprints on the newspaper were identified as petitioner's (Tr. 217-219, 224-225).

None of the narcotics which Mattera purchased bore the requisite federal stamps nor did the purchaser present the requisite Treasury form for the purchases (Tr. 63-64, 73-74, 80, 149).

On February 18, 1954, Sperna drove with petitioner to the building where Pape lived. Petitioner entered the building, left within five to ten minutes, and drove away with Sperna. About ten or fifteen minutes later Pape left the building. (Tr. 94-95.)

On March 16, 1954, petitioner, his co-defendants and the alleged co-conspirators were arrested. A search of Pape's apartment revealed heroin and heroin paraphernalia. (Tr. 97-98, 471-473, 476.)

Petitioner testified that he at no time had any knowledge or dealings of any kind concerning nar-

cotics (Tr. 439) and that his presence with Sperna on July 23, 1953, was merely to take a ride with Sperna at Sperna's request (R. 440-441). His fingerprints on the newspaper, he explained, were probably placed there when he glanced over the newspapers at the corner candy store which he and Sperna frequented, or when he purchased papers from a paralytic newsboy and returned them to him when he finished so that the boy could resell them (Tr. 443).

ARGUMENT

1. Seeking further review of the concurrent findings of both courts below, petitioner contends that the evidence *aliunde* failed to establish a *prima facie* showing of his participation in the conspiracy, so that it was error to admit against him evidence of Coduto's statements to Mattera on July 23 and August 13, 1953.[3] But petitioner's undisputed association with the known conspirators on two occasions when the narcotic sales were negotiated—with Sperna on July 23 and with Coduto, Schullo and Sperna on October 14 (see Statement *supra*, pp. 3, 4-5)—indicated more than innocent association, particularly in light of the additional undisputed evidence that petitioner's fingerprints appeared on the newspapers with which the narcotics sold on September 18 and December 9

[3] *I.e.*, the statement "there they are now" when petitioner and Sperna drew up to Mattera's car on July 23, and the statement on August 13 that Coduto could not furnish heroin because the "fellows that were in the car the other day, the other time" were out of town (Tr. 343-345), *supra* pp. 3-4.

were wrapped. Any one of these facts alone might perhaps be explained away as coincidence, but the combination of all is not subject to such an explanation. Petitioner's association with the conspirators at the time the sales were made and his fingerprints on two different occasions on the particular newspaper in which the narcotics were wrapped comprise a very different picture from that involved in *United States* v. *Di Re*, 332 U.S. 581, where the defendant on a single occasion accompanied "a criminal to a crime rendezvous" (*id.* at 593).

Although no jury was sitting in the case, the court carefully did not admit in evidence or even hear any of the declarations in question until after the admission of the evidence which has just been outlined and after he had made a determination that this independent proof justified an inference of petitioner's knowledge of and membership in the conspiracy. His conclusion that the independent evidence was sufficient to justify admission of the declarations, and that altogether the evidence established petitioner's guilt beyond a reasonable doubt, is supported by the record and presents no issue for review by this Court.

2. Petitioner urges (Pet. 9-11) error in the court's admission in evidence of the events of February 18, 1954,[4] on the ground that they occurred subsequent to the last overt act, on December 9,

[4] *I.e.*, petitioner's' presence on this date in the building in which Pape, a known conspirator, lived and where heroin and narcotic paraphernalia were subsequently found. See Statement *supra* p. 5.

1953, which was charged in the indictment. It is well settled, however, that a conspiracy may be a continuous offense until its purpose has been consummated or until it is abandoned. See *Brown* v. *Elliott*, 225 U.S. 392, 400; *United States* v. *Kissel*, 218 U.S. 601, 607-608; *Bellande* v. *United States*, 25 F. 2d 1, 2 (C.A. 5), certiorari denied, 277 U.S. 607. And in proving a conspiracy the government is not confined to the overt acts charged in the indictment. *United States* v. *Downing*, 51 F. 2d 1030, 1031 (C.A. 2); *Meyers* v. *United States*, 36 F. 2d 859, 860 (C.A. 3), certiorari denied, 281 U.S. 735. The instant case involved a continuing conspiracy to sell narcotics, and there was no evidence that it had been abandoned before the arrest of the conspirators on March 16, 1954, the date alleged in the indictment as the termination date. Absent evidence of abandonment, the presumption is that the conspiracy continued in existence. *United States* v. *Perlstein*, 126 F. 2d 789, 798 (C.A. 3), certiorari denied, 316 U.S. 678; *Nyquist* v. *United States*, 2 F. 2d 504 (C.A. 6) certiorari denied, 267 U.S. 606; *Remus* v. *United States*, 291 Fed. 501 (C.A. 6). Accordingly, the February 18 events were properly admitted as evidence of the conspiracy.

Moreover, as petitioner himself observes, the evidence in question concerned "an innocuous event" (Pet. 9). As we have shown in the preceding point (pp. 6-7, *supra*), the independent evidence demonstrating *prima facie* petitioner's implication in the conspiracy, laying a basis for the evidence of his co-conspirator's statements, was primarily evidence

of his direct implication in the unlawful transactions. Though mentioned by the Court of Appeals (Pet. 12a), and properly held admissible, the proof of petitioner's visit with Sperna to the building where Pape was present on February 18, 1954, was in itself a minor aspect of the case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY, 1956.

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